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Supreme Court, U.S.
FILED
APR 16 1992
OFFICE OF THE CLERK

No. 91-1495

In The

Supreme Court of the United States

October Term, 1991

ANTHONY J. BURKHART and
CARMELLA L. BURKHART,

Petitioners,

v.

ALLEN L. DAVIES, M.D., JOHN T. OGLESBY, M.D., and MEDICAL CENTER OF DELAWARE, INC., a Hospital Corporation of the State of Delaware,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Should the United States Supreme Court deny certiorari when petitioner has failed to raise or preserve a federal question at the State Court level?

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The Respondent Allen L. Davies, M.D., respectfully prays that the petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Delaware be denied.

JURISDICTION

The final judgment of the Delaware Supreme Court was entered on December 20, 1991. Petitioners assert jurisdiction in this Court under 28 U.S.C. § 1257 (1992).

Respondent Davies disputes jurisdiction here because Petitioners failed to raise or preserve any federal question at the state court level. Please refer to Argument I of this Brief.

COUNTER-STATEMENT OF THE CASE

This action was filed in February, 1986. The Petitioners sued respondents Allen L. Davies, M.D., John T. Oglesby, M.D. and the Medical Center of Delaware in Delaware's Superior Court for alleged medical malpractice. Respondents denied liability and discovery ensued.

The Petitioners consistently failed to answer Respondent Davies' interrogatories inquiring as to the identity and opinion of any qualified expert witness prepared to testify that Dr. Davies departed from the applicable standard of care, which proof is necessary to maintain a medical malpractice action pursuant to Delaware Statute. DEL. CODE ANN. tit. 18, § 6853.

The Petitioners twice suffered Trial Court orders compelling identification of expert witnesses and a statement of their opinions and the grounds therefor. To stave off sanctions, the plaintiffs identified seven different doctors as "experts" at various times. The plaintiffs later acknowledged that among those seven doctors, only Dr. William F. Haines of Malvern, Pennsylvania, would testify on the standard of care applicable to Respondent Dr. Davies.

Dr. Haines' deposition was taken only after Dr. Davies obtained a Court order to compel it. At deposition, Petitioners' expert Dr. Haines unequivocally stated that he was not prepared to offer any opinion that Dr. Davies deviated from the standard of care. Eleven days before the scheduled trial, Dr. Haines testified as follows:

> Q. * * * Just to be sure that I understand your answer: today, based on the information that you have seen to date, you are not prepared to offer an opinion that Dr. Davies deviated from the standard of care. Am I correct?
>
> A. Correct.

Transcript of Dr. Haines' testimony, 1/11/91, at 20.[1]

Other testimony of Dr. Haines at deposition was that:

- Dr. Haines was unaware of the trial date eleven days later (Tr.2).
- Dr. Haines had no medical chart materials or other materials with him upon which to base an opinion (Tr.3). Nonetheless, Dr. Haines professed familiarity with the necessary materials (Tr.3-5).
- Dr. Haines first said he had no opinion with respect to whether or not Dr. Davies conformed to the standard of care (Tr.17). He then said he was not prepared to offer an opinion that Dr. Davies deviated from the standard of care (Tr.20).

After Dr. Haines' deposition, it was evident to all concerned that the plaintiff lacked the requisite expert

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[1] References are to page numbers in the original transcripts, as noted in the attachments to the Petition.

testimony to present any case to the jury. Of the other six doctors named as "experts" for the plaintiff at various times, the plaintiff could offer none on standard of care issues.

Plaintiffs' counsel consented to an immediate hearing of Dr. Davies' Motion for Summary Judgment on the Friday before the Tuesday upon which trial was scheduled to begin. Dr. Davies recited in his Motion for Summary Judgment that:

> Undersigned counsel is informed that, if the Court is agreeable, the plaintiff will consent to an immediate hearing of this Motion, to determine whether there remains any need for trial.

Dr. Davies' Motion simply noted that without the requisite expert testimony, the plaintiff could offer no case for a jury determination pursuant to the Delaware statute, and requested dismissal.

At oral argument, plaintiffs' counsel admitted that Dr. Haines was "the only medical witness expert" on the applicable standard of care, and that Dr. Haines "had no clue as to what was going on." He further conceded that:

> [T]he plaintiff does not have a medical expert who can testify that there was a deviation from the standard of care that's required by the statute * * * as to any of the defendants (Transcript of Proceeding, January 17, 1991 at 7-8). I have to agree with the * * * defendants because it is uncontradicted that there isn't the required testimony. * * * I cannot * * * disagree with the defendants that the plaintiffs have not met that requirement. And if trial is held on Tuesday, there'll not be a medical expert witness capable

> of meeting the standard that's required. (Transcript of January 17, 1991 hearing, at p.9-10)

The trial Court granted the motion for summary judgment. The plaintiffs initially appealed to the Delaware Supreme Court *pro se;* two attorneys soon entered appearance for them in that appeal, before briefs were filed. On appeal, the petitioners raised only the following issues:

1. There was a material issue of fact notwithstanding the absence of any expert testimony in support of the allegations in the Complaint;
2. Respondents were required to support their Motions for Summary Judgment with a medical expert's affidavit; and
3. No action on the Motion for Summary Judgment should have been taken in absence of ten (10) days notice.

The Delaware Supreme Court affirmed the Superior Court's order granting summary judgment on December 20, 1991.

No federal questions were presented on the Delaware appeal. The record below is devoid of any references to the United States Constitution or to any federal law.

Petitioners filed a petition for writ of certiorari with the Supreme Court in March of 1992. The sole issue raised by petitioners in this Court is whether the Delaware Supreme Court deprived the petitioners of their federal constitutional due process right to trial by affirming summary judgment when genuine issues of material fact existed. This is the first time this issue has been raised in this

litigation. Petitioners allege jurisdiction pursuant to 28 U.S.C. § 1257 (1992).

REASONS FOR DENYING THE PETITION

1. This Honorable Court lacks jurisdiction. The Petitioners failed to raise or preserve a federal question at the state court level, depriving the Delaware Courts of the opportunity to pass on the alleged due process issue. *Webb v. Webb*, 451 U.S. 493 (1981).

2. Grant of summary judgment constituted due process of law. Summary Judgment was properly granted because the Petitioners' proof completely failed concerning an essential element of their case, and all other facts were therefore rendered immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

I. THIS COURT IS WITHOUT JURISDICTION BECAUSE THE PETITIONERS FAILED IN THE STATE COURTS TO RAISE OR PRESERVE THE CONSTITUTIONAL BASIS THEY NOW ASSERT FOR GRANT OF CERTIORARI.

The United States Supreme Court's power to review final judgments rendered by State Courts is set forth at 28 U.S.C. § 1257 (a), which provides in pertinent part:

> Final judgments or decrees rendered by the highest Court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States.

Section 1257 "requires that in the State Courts Petitioner have 'specially set up or claimed under the Constitution * * * of * * * the United States' that right which she now seeks to have this Court enforce. 28 U.S.C. § 1257 (3)." *Webb v. Webb*, 451 U.S. 493 (1981).[2]

Webb was a child custody dispute in which Florida and Georgia had inconsistently awarded custody, Florida to the Petitioner and Georgia to the Respondent. The Petitioner sought the United States Supreme Court's determination of whether United States Constitution Article IV, Section 1 required Georgia to give full faith and credit to the earlier Florida decree. Relying on the Petitioner's assertion that the federal question had been properly raised in the Georgia courts, and on the Respondent's failure to contest jurisdiction, the Court granted certiorari, only to later discover a jurisdictionally disabling flaw:

> We are * * * largely dependent upon the assertions made by the parties as to what [the] record will demonstrate concerning the manner in which a federal question was raised below.

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[2] Between Your Honorable Court's opinion in *Webb* and the Delaware Supreme Court's determination of the present case, 28 U.S.C. § 1257 was amended by the Supreme Court Case Selections Act (Public Law 100-352), which became effective June 27, 1988. All of the old contents were stricken out and a fresh § 1257 was enacted in their place. The substantive effect of § 1257 on the present case is unchanged. The old paragraphs (1) and (2), authorizing appeal, were eliminated and only the certiorari procedure (previously contained in paragraph 3) was retained. The old paragraph (3), without changing substance, became subdivision (a) in the new § 1257. Thus, the *Webb* opinion's reference to 28 U.S.C. § 1257 (3) presently refers to 28 U.S.C. § 1257 (a).

> Because Petitioner forthrightly asserted that the federal question had been raised and this assertion was not disputed by the Respondent, we assumed that there would be no jurisdictional problem in reaching the issue raised by the Petition, and we granted certiorari. 449 U.S. 819. It has become clear, however, that the Federal question was not raised below and that we are without jurisdiction in this case. We must therefore dismiss without reaching the merits.

Webb, 451 U.S. at 494-95.

In the present case, the Petitioners do not go so far as to claim that the Fourteenth Amendment due process issue they press was in fact raised before either the Delaware Trial or Supreme Courts. They apparently concede that it was not. Rather than identifying the stage of the proceedings at which the due process issue was first allegedly raised, at page (ix) of their Petition, they suggest this Court has jurisdiction in *every* case where in construing a state statute a state court allegedly fails to guard, enforce, and protect every right granted or secured by the Constitution of the United States, regardless of Petitioners' failure to press a particular federal constitutional right in the state court.

The present Petitioners' failure to raise or preserve the asserted Federal constitutional right is more marked than that of the Petitioners in *Webb*. After a full review of Petitioners' briefs and the transcripts of prior proceedings below, this Court in *Webb* determined that while the Petitioner had used the phrase "full faith and credit" "at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on

the Full Faith and Credit clause of the Federal Constitution." *Webb* at 496. Citing a longstanding rule of procedure, the Court stated that "Th[is] Court has consistently refused to decide Federal constitutional issues raised here for the first time on review of State Court decisions." *Id.* at 499, quoting *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). "We have had several occasions to repeat this rule since then, [citations omitted] and we see no reason to deviate from it now." *Id.*

As the Court said in *Webb*, there are "powerful policy considerations underlying the statutory requirement and our own rule that the Federal challenge to a State statute or other official act be presented first in the State Courts." *Id.* at 499. Principles of comity and federal respect for state sovereignty require that the state Courts be afforded the opportunity to first perform their duty, including responding to attacks on state authority based on federal law. *Id.*

> At the minimum * * * there should be no doubt from the record that a claim under a *Federal* statute or the *Federal* constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court. *Id.* at 501. [Emphasis in original.]

The Court cited other factors supporting this policy, including the importance of affording the parties below the chance to prepare a proper record, and conservation of judicial resources.

In the present case, the Petitioners failed to raise below the federal due process question they now press, thereby depriving the parties of any opportunity to develop a record, and further depriving the Delaware Courts of any opportunity to pass on the issue. It may not be newly raised now.

For the reasons given, this Court lacks jurisdiction over the question presented by the Petitioners, and should therefore deny the Petition for Certiorari.

II. SUMMARY JUDGMENT WAS PROPERLY GRANTED BELOW IN A MANNER SATISFYING ANY DUE PROCESS CONCERNS

In a medical malpractice case, Delaware imposes on the plaintiff the statutory requirement that:

> No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death * * * . DEL. CODE ANN. tit. 18, § 6853.

Below, the Petitioners entirely failed to meet the requirement of § 6853. They can only concede that on the eve of trial their only expert designated to testify on standard of care issues at trial, was completely unprepared to testify that Respondent Dr. Davies deviated from the applicable

standard of care. Eleven days before trial, Dr. Haines so testified at deposition. Four days before trial was to begin, Petitioners' trial attorney conceded in open court that Petitioners utterly lacked qualified expert testimony that any of the present Respondents deviated from the applicable standard of care, and therefore lacked essential proof to meet their burden under DEL. CODE ANN. tit. 18, § 6853.

Delaware Superior Court Civil Rule 56, Summary Judgment, is substantially identical to Federal Civil Rule of Procedure 56. Subsection (c) provides in relevant part that:

> (c) * * * [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Statute DEL. CODE ANN. tit. 18, § 6853 is explicit that no genuine issue of material fact requires submission to the jury if the plaintiff does not produce an expert capable to testify that the defendant violated the applicable standard of care. Expert proof of deviation from the applicable medical standard of care was an element essential to Petitioners' case below, on which they would have borne the burden of proof at trial. Where, as here, such proof is absent, Rule 56 makes it plain that summary judgment is in order, and "shall be rendered forthwith."

The United States Supreme Court has confirmed that under Rule 56, where plaintiffs fail to make a showing sufficient to establish the existence of an element essential to their case, and on which they will bear the burden of proof at trial, there can be no genuine issue as to *any* material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 323 (1986). A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Therefore, the moving party is entitled to judgment as a matter of law.[3]

A review of the material attached to the Petition for a Writ of Certiorari leaves no question that if Respondent Davies had moved for a directed verdict at the close of the plaintiffs' case, that motion would have been granted because the plaintiff would not have made out a sufficient case under DEL. CODE ANN. tit. 18, § 6853 for lack of the required expert testimony. The comments of the Trial Judge at the January 17, 1991 hearing reflect his complete lack of discretion under the facts presented. Addressing Mr. Burkhart, the Court said:

> I know your attorneys have explained the law to you and I'm sure you must know that the Medical Care – Health Care Malpractice Act provides, and I'll quote it for you, "No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care." And that's a law enacted by the Legislature which applies to this case. And there is nothing that I can do about it or your attorneys can do about it or anybody else can do about it, except apply it.

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[3] Petitioners' review of the facts of the *Celotex* case completely ignores its central rule.

> And you have a case where your claiming that – medical practice [sic] and there's no expert witness who is prepared to support that allegation. And as a consequence, the Motion will have to be granted. (Tr. at 10-11.)

The Court was following a clear legislative mandate which dictated a result under the uncontested facts before it.

The grant of summary judgment in this case, and its affirmance, correctly reflect that the standard for granting a motion for summary judgment mirrors the standard for a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 at 250 (1986). Where a Trial Court would be duty bound to direct a verdict for the defendant, it is correct in entering summary judgment where an essential element of proof would necessarily fail at trial.

This Honorable Court has recognized that due process concerns are satisfied by properly granted Summary Judgment under Rule 56:

> Summary Judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal rules as a whole which are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327.

The Delaware Supreme Court properly and explicitly relied on *Celotex* in affirming the Trial Court's grant of summary judgment. Even if jurisdiction in the United States Supreme Court were proper, any due process concerns were satisfied below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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April 16, 1992